No. 16020

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. NADINE RODGERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Jurisdictional Statement.

The jurisdiction of the District Court is founded upon Title 18, United States Code, Section 3231. An Indictment was returned by the Grand Jury, Southern District of California, Southern Division, in which Appellant and her deceased husband were charged in one count with the illegal importation of 400 grains of heroin, in violation of Title 21, United States Code, Section 174. Pretrial hearing was had on a motion by Appellant to suppress evidence and findings of fact and conclusions of law were filed ordering the denial of the motion. Trial was thereafter waived and the case submitted upon stipulation between the parties. Judgment was rendered finding Appellant guilty and sentencing her to the custody of the Attorney General for a period of five years. Notice of Appeal was filed by Appellant and jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Sections 1291 and 1294.

Statement of the Case.

References designated "Tr." refer to the Reporter's Transcript and the references to "Clk." refer to the Clerk's Transcript.

On December 23 and 24, 1957, Appellant's Motion to Suppress Evidence came before the United States District Court for hearing, Judge James M. Carter presiding. The Court found the facts as follows: At about 3:00 p.m. on October 11, 1957, Evan W. Rodgers and Gilbert Martinez entered the United States from Mexico at the port of San Ysidro, California in an automobile owned by Evan W. Rodgers [Tr. 108]. The occupants of the car were detained for customs inspection [Tr. 99, 109]. Evan W. Rodgers admitted that he had a prior narcotics conviction [Tr. 100]. He had a cashier's check for $2,000 [Tr. 110]. There was a suitcase in the trunk of the car which contained women's clothing and a legal document concerning the sale of real estate [Tr. 109, 177].

Beginning at about 4:00 p.m. on the same day Customs Agent Clarence A. Spohr, Jr., interviewed Mr. Rodgers about an alleged violation by Mr. Rodgers of Title 18, United States Code, Section 1407 [Tr. 98-99]. Mr. Rodgers told Agent Spohr the following:

That he was convicted in San Francisco in 1952 of conspiring to violate narcotic laws and was sentenced to three years imprisonment [Tr. 100]. That some short time before October 11, 1957, he left San Francisco for Tijuana with his wife, Nadine E. Rodgers and accompanied by Mr. and Mrs. Martinez; that he and Gilbert Martinez left their wives in Los Angeles and drove to Tijuana in order that Rodgers, a professional horse trainer, could visit friends at the race track; that a friend

named "Manuel" went along on the trip from San Francisco to Tijuana [Tr. 100].

At about 4:30 p.m. of the same day at San Ysidro, Calif., agent Spohr interviewed Gilbert Martinez [Tr. 102]. Mr. Martinez told Agent Spohr that he was then out on bail on a pending charge under Section 11500 of the Health and Safety Code of California [Tr. 124] and that his last injection of heroin was three days ago [Tr. 128]. Agent Spohr observed the marks of an addict on the arms of Martinez [Tr. 127]. He said that he was an informant for the Federal Bureau of Narcotics in San Francisco [Tr. 125, 171], and named several agents with whom he had worked [Tr. 125]. All of the names were familiar to Agent Spohr as names of agents who he knows are working in the San Francisco area [Tr. 125]. Martinez requested that he not be prosecuted for what he would tell Agent Spohr. Spohr said that the decision rests through the United States Attorney but that he was quite positive the United States Attorney would go along with anything along those lines [Tr. 143]. Mr. Martinez then told Agent Spohr the following: That Mr. and Mrs. Evan Rodgers, Mr. and Mrs. Gilbert Martinez and Manuel Garcia left San Francisco together on October 6, 1957, in order that Evan Rodgers could purchase heroin through a connection of Garcia's in Tijuana [Tr. 103]. That the five of them arrived in Tijuana on October 7, 1957, where Garcia located his Mexican connection "Red"; that Garcia alone purchased heroin at that time as Rodgers said that his money was tied up in a check [Tr. 104]; that they all returned to Los Angeles where Evan Rodgers cashed a $3,200 check, taking $1,200 in cash and a cashier's check for $2,000; that Garcia absconded with $600 of Evan Rodger's money on the pre-

tense that he would buy heroin for Rodgers in Los Angeles [Tr. 105]; that Mr. and Mrs. Rodgers and Mr. and Mrs. Martinez again went to Tijuana on October 9, 1957, where Rodgers contacted "Red"; that on October 10, 1957, Evan Rodgers purchased two rubber contraceptives full of heroin [Tr. 106]; that on October 11, 1957 at about 1:00 p.m. [Tr. 115] Mrs. Rodgers and Mrs. Martinez returned to the United States on foot through the port of San Ysidro with the heroin concealed by Mrs. Rodgers in her body cavity [Tr. 108, 114, 171, 172]; that the women were then to travel by bus to Tijuana and wait at the bus depot until the men arrived in the automobile [Tr. 107]; that Evan Rodgers and Gilbert Martinez crossed the border at about 3:00 p.m. where they were detained by customs inspectors [Tr. 108]; that the women could be found at the Greyhound bus depot at San Diego with the heroin concealed in Mrs. Rodgers' body [Tr. 172]; that Martinez would lead Agent Spohr there and point out the women [Tr. 107, 172].

At about 6:00 p.m. on the same day Customs Agent Walter A. Gates entered the room where Customs Agent Spohr was interviewing Gilbert Martinez [Tr. 171]. Both agents believed Martinez and the corroborating evidence [Tr. 120, 175]. The agents decided to arrest Nadine E. Rodgers [Tr. 187]. They didn't attempt to obtain a Warrant of Arrest because "time was of the essence" [Tr. 114]. Agent Spohr anticipated that if more time elapsed the women would worry that something had happened and would take the bus north [Tr. 115]. The Court took judicial notice that if a judge or commissioner were found at home the distance and traffic would cause several hours delay if a Warrant were sought [Tr. 151, 153]. Accordingly, Agents Spohr and Gates immediately started

for San Diego in separate cars [Tr. 111, 172]. Agent Spohr and Gilbert Martinez went to the Greyhound bus depot in San Diego and waited for Agent Gates in the rear parking lot [Tr. 111]. Meanwhile, Agent Gates took Evan Rodgers to the San Diego City Jail where Rodgers was booked on Title 18, United States Code, Section 1407. Gates then joined Spohr and Gilbert Martinez at the parking lot of the bus depot [Tr. 172].

At about 7:00 p.m., October 11, 1957, Gilbert Martinez accompanied by Agents Gates and Spohr, walked to the Greyhound bus depot at San Diego [Tr. 112, 173]. Gilbert Martinez saw his wife and Mrs. Rodgers drinking coffee in a booth at the coffee shop of the Pickwick Hotel, adjacent to the bus depot [Tr. 112, 173, 180]. Mr. Martinez entered the coffee shop and walked up to the booth alone. Both women greeted him [Tr. 112]. His wife stood up, held his arm, and they talked together for several moments [Tr. 112, 173, 182]. Agents Gates and Spohr came up and identified themselves as agents of the Treasury Department [Tr. 112, 133]. The women were asked their names and they said that they were Mrs. Rodgers and Mrs. Martinez [Tr. 112, 186]. Agent Spohr asked the women if they would accompany him [Tr. 112, 186]. They started to get out of the booth and said they had a check to pay [Tr. 112]. Agent Gates noticed that one of them held a straw shopping bag of the kind ordinarily seen and bought in Mexico [Tr. 174]. He asked what they had brought with them from Mexico and one said only a pair of shoes and a straw hat [Tr. 174]. On the way to the cashier's booth Agent Gates asked the women if they had just arrived from Mexico. They answered, "Yes, a few hours before" [Tr. 113]. After the check was paid and on the way out the door Mrs.

Rodgers asked, "Well, where are we going?" Agent Spohr said, "You are going to the San Diego City Jail. You are under arrest" [Tr. 114, 185]. The agents did not threaten the women nor did they use any force to have them come along to the police station [Tr. 114]. Agent Spohr and Agent Gates then drove Mr. and Mrs. Martinez and Mrs. Rodgers to the San Diego City Jail [Tr. 115, 175].

At the San Diego City Jail, Agent Gates kept Mr. Martinez in the booking office [Tr. 116, 175]. Agent Spohr escorted Mrs. Rodgers and Mrs. Martinez toward the female detention quarters [Tr. 116, 175]. As they walked down the corridor Agent Spohr saw that Mrs. Rodgers held a Kleenex in her left hand and was concealing it against her skirt. He said, "What have you got in your hand?" [Tr. 116]. Mrs. Rodgers showed him the Kleenex and he said "Give it to me" [Tr. 117]. Mrs. Rodgers handed over the Kleenex without protest [Tr. 117]. In the Kleenex was a rubber contraceptive which contained a white substance similar to heroin [Tr. 117]. Agent Spohr then said, "Where is the rest of it?" [Tr. 117]. Mrs. Rodgers reached into her bra and produced another folded Kleenex which also held a rubber contraceptive containing a white powder like heroin [Tr. 117]. Mrs. Rodgers' only other words were "That's all I got" [Tr. 118]. Agent Spohr did not threaten Mrs. Rodgers nor did he use any force in recovering the heroin [Tr. 118].

No claim was made by Mr. Rodgers by affidavit or otherwise to the heroin in Mrs. Rodgers' possession. Mrs. Rodgers by affidavit set forth the date of her marriage to Mr. Rodgers and alleged that all property owned by them was community property.

ARGUMENT.

I.

The Constitution of the United States Prohibits Only Searches and Seizures Which Are Unreasonable.

The Fourth Amendment to the Constitution provides in effect that all persons shall be secure not only in their persons but in their property and effects and shall be free from searches and seizures which are unreasonable. It is important to note that not all searches are prohibited by this amendment but only those which are "unreasonable." *Carroll v. United States,* 267 U. S. 132, 147 (1925). Stated another way, this amendment protects persons against officers acting on "whim, caprice or mere suspicion." *Brinegar v. United States,* 338 U. S. 160, 177 (1946). The test by which the actions of officers in making a reasonable search or seizure has been often stated. The rule is that before officers may conduct a search or seizure incident to an arrest there must be probable cause for such action. "Probable cause exists where 'the facts and circumstances within their (the officers) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.' "

Carroll v. United States, 267 U. S. 132, 162, *supra;*

Brinegar v. United States, 338 U. S. 160, 175, *supra;*

Blackford v. United States, 247 F. 2d 745, 749 (9th Cir. 1957);

United States v. Walker, 246 F. 2d 519, 526 (7th Cir. 1957).

In *United States v. Walker, supra,* the Court considered a new factor, the Narcotic Control Act of 1956, Title 26, United States Code, Section 7607, under which power is conferred upon officers of the Customs and others to ". . . make arrests without warrant for violations of any law of the United States relating to narcotic drugs . . . where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation." (70 Stat. 570.) The Court states that probable cause and "reasonable grounds" are concepts having virtually the same meaning.

II.

Under the Facts of This Case as Adduced During the Hearing on the Motion to Suppress, the Trial Judge Did Not Err in His Conclusion That the Officers Had Reasonable Grounds for Their Actions.

An examination of the rule quoted before indicates that the question of whether or not probable cause exists is essentially a factual inquiry and no fixed formula can be arrived at. The test is reasonableness under all the circumstances and that depends upon the facts and circumstances of each case.

United States v. Rabinowitz, 339 U. S. 56, 63 (1950);

Rocchia v. United States, 78 F. 2d 966, 969 (9th Cir. 1935).

Although every case must be decided on its own particular facts this Honorable Court's attention is respectfully

invited to the following authorities wherein there was found to be probable cause:

Brinegar v. United States, supra;

Carroll, et al. v. United States, supra;

Williams v. United States, 160 F. 2d 125 (8th Cir. 1958);

United States v. Walker, supra;

United States v. Paradise, 253 F. 2d 319 (2nd Cir. 1958);

Blackford v. United States, 247 F. 2d 745 (9th Cir. 1957);

United States v. Hamm, 163 Fed. Supp. 4 (1958);

People v. Holguin, 145 Cal. App. 2d 520 (1956);

Willson v. Superior Court, 46 Cal. 2d 291 (1956).

On October 11, 1957, when Customs Agents Spohr and Gates arrested appellant at San Diego, California, the agents had knowledge of the facts adduced at the hearing on motion to suppress [Clk. Tr. 44 *et seq.*].

Probable cause in this case arose from the detailed information given the officers at the border and their observations of facts and circumstances both at San Ysidro and up at San Diego. The combination of these two sources of knowledge was sufficient to warrant the officers in the reasonable belief that a narcotic offense had been and was being committed by appellant. In arriving at such belief, the officers acted as reasonably cautious men.

On October 11, 1957, Evan Rodgers, appellant's husband, and Gilbert Martinez entered the United States from Mexico in Mr. Rodgers' automobile. Shortly there-

after both men were detained by Custom agents at San Ysidro for possible failure to register as a previously convicted felon on a narcotics charge, in violation of Section 1407 of Title 18, United States Code. Agent Spohr interrogated each of them, commencing with Mr. Rodgers *alone* at approximately 4:00 P.M. Thereafter, Agent Spohr questioned Martinez *alone* beginning at about 5:00 P.M. on the same day [Tr. 98, 99, 102]. *It is obvious from the transcript that Martinez and Rodgers did not have a chance to get together on their stories while being interrogated by the Customs agents.*

Mr. Rodgers admitted that he had been convicted in San Francisco in 1952 of conspiring to violate narcotic laws and sentenced to three years imprisonment. Martinez admitted to the agent that he was out on bail from a pending state charge of a violation of Section 11500 of Health and Safety Code, but had stated he had had no prior narcotic conviction. That charge involved an alleged possession of narcotics [Tr. 124-125]. *The agent noticed marks on Martinez's arms which were the marks of a heroin addict* [Tr. 127]. Martinez further told Spohr that the last time he had used a narcotic was three days prior to the interrogation. Both of the occupants of the car had failed to register under Section 1407 of Title 18, United States Code, when they entered the United States on October 11, 1957.

Mr. Rodgers stated that he and appellant had left San Francisco for Tijuana *with Mr. and Mrs. Martinez* and *a fifth person named Manuel.* He, Mr. Rodgers, further claimed that the two wives were in Los Angeles at that time, *which statement was later shown to be false* by finding Mrs. Rodgers and Mrs. Martinez at the bus station in San Diego, and that the men had gone to Tijuana so

that Rodgers could visit friends at the racetrack. He went on to say that he was a professional horse trainer but that he had located no one he knew at the track. Mr. Rodgers also stated that after they got to Mexico, Manuel had *"cut out"* and he did not know what had happened to him.

The agents found *a suitcase containing women's clothing* in the trunk of the car. Mr. Rodgers was also carrying *a cashier's check for $2,000.00.* Mr. Rodgers admitted that the check was his and told Spohr "something about selling property." Rodgers was thereafter booked in the San Diego County Jail for a violation of Section 1407, failure to register [Tr. 148].

As indicated above, an interview was had with Martinez directly after the interrogation with Rodgers. Martinez was told by agent Spohr, as was true in the case of the interview with Rodgers, that he was entitled to counsel through all proceedings and that anything he said could be used against him in the future. After Martinez had been in custody several hours, he asked Agent Spohr about the government *not prosecuting Martinez if the latter told Spohr about Mr. and Mrs. Rodgers.* The agent advised Martinez that they would see the proper authorities, the United States Attorney, about that but that "the authority was not mine to say." He told Martinez that the decision would rest with the United States Attorney and added that he was positive the United States Attorney would go along with anything "along those lines." The request from Martinez also involved *freedom from prosecution as far as his wife was concerned* [Tr. 142-143]. Spohr then told Martinez that he was positive *the latter and his wife would be used as material witnesses in the matter.* Although Agent Spohr did not tell Martinez that unless Martinez told him about Rodgers and his

wife that Martinez would be prosecuted as a user of narcotics who had failed to register, it is obvious that *Martinez was apprehensive about his status* in that respect [Tr. 143-144].

During the rest of the interview with Gilbert Martinez, the officers received essentially the following information: that appellant and her husband, along with Mr. and Mrs. Martinez, *and Manuel Garcia* had left San Francisco on October 6, 1957 for the purpose of acquiring heroin in Tijuana. That after a first trip to Tijuana they all returned to Los Angeles where Mr. Rodgers cashed a large check. They all went back to Tijuana a second time where Rodgers acquired heroin through a peddler named "Red." At about 1:00 on October 11, 1957, appellant accompanied by Mrs. Martinez returned to the United States on foot through the port of San Ysidro *with the heroin concealed in Mrs. Rodgers' body cavity.* The women were to travel by bus to San Diego and wait for the men at the Greyhound Bus Depot before departing to San Francisco. Gilbert Martinez also told the agent that he had worked as an informant for the Federal Bureau of Narcotics in San Francisco and *named several agents known to Mr. Spohr* with whom the latter had worked. As will be seen from the transcript and the Findings of Fact filed by the Court, *Martinez made a detailed and comprehensive statement of the circumstances* surrounding the various trips made by the men and their wives and Manuel to Tijuana and back to Los Angeles.

As stated above, it appears that the interrogation of Gilbert Martinez commenced at about 5:00 P.M. [Tr. 102]. When the questioning was finished, it was at a time when most law enforcement agencies, both federal and local at San Diego, would have been closed. However, Agent Spohr was able to check some local records

in San Diego, finding that Martinez had been involved in a minor infraction of the law with that police department. Since he had no information as to any particular prior offense committed by Martinez, it was obviously then impossible for the agents to check much further to determine if he had a prior record. However, since Agent Spohr did have specific information with respect to Rodgers' prior narcotic conviction, he called one "Bud" Hawkins of the State Narcotics Bureau and was able to contact him. The testimony was that Spohr asked Hawkins just more or less to "verify Mr. Rodgers' 1952 arrest." The reasonable inference from that testimony is that the person he had telephoned did verify the prior conviction [Tr. 136].

As stated above, it is clear that each case must be resolved on its own factual situation. Although the fact that this transaction occurred at the Mexico-California border did not *per se* give the officers probable cause to effect an arrest of the appellant, it is submitted that this circumstance is one of the factors to be considered with the others in determining the issue. As announced by this Honorable Court in *Blackford v. United States, supra,* at page 752:

> "The Court will take judicial notice of the fact that the Mexico-California border is one of the major centers for the importation of narcotic drugs into the United States. Moreover, we are told in the record that between 18 and 20% of international traffic of narcotics in this area is conducted by smuggling the drugs in various body cavities. One need only read the daily newspaper to recount the horror, harm and hardship that these drugs produce. The problem of detecting and putting to an end this source of supply and of doing it effectively is one of great magnitude

and importance to the American people. It is a task which daily confronts law enforcement officers along the border."

As the record shows, both Agents Sphor and Gates at the border talked at length with Gilbert Martinez and were convinced that he was telling the truth. It is important to keep in mind that *they had ample opportunity to observe his demeanor* since the interview was conducted personally, not over the telephone. It is felt that great weight should be given to this evaluation of the officers who are experienced in such matters by reason of their duties at the border, "one of the major centers for importation of narcotic drugs into the United States." At the time of the interview they exercised the same type of judgment of his credibility as a court or jury would bring into play in determining whether a witness on the stand is reporting events truthfully. In addition to the officer's opportunity to observe Martinez and question him, at length the government submits that Martinez's obvious state of mind as to his own position at that time was a most significant factor in determining whether the officers were justified in believing that he was relating the events accurately. After sitting around a couple of hours before he was questioned by the agents, Martinez had ample time to consider the precarious position in which he found himself. The needle marks on his arms would show the the officers that he was a narcotic user and it was obvious that he had failed to register as required by law. He was out on bail on a narcotics charge. At that time he thought he could be prosecuted for something because he asked Spohr about not being prosecuted if he told the agent about Mr. and Mrs. Rodgers' activities. It is clear that *Martinez was also worried about his wife* since his request involved a freedom from prosecution as far as she was

concerned. Although he did not indicate that she had smuggled any heroin, he was concerned about her possible involvement in the matter. Although officer Spohr told Martinez that he was positive the United States Attorney would go along with "anything along those lines," he still said that "the authority was not mine to say." Thus, in Martinez's mind there was still a possibility of a prosecution. Further, Spohr definitely told Martinez and his wife that *they would be used as material witnesses* in the matter.

For the above reasons, the agents were legally justified in believing that Gilbert Martinez had a compelling motive to relate the true facts. Being in custody for failing to register and hoping for the dismissal of any charges that might be lodged against him or his wife, Martinez, in any reasonable light, *would certainly have avoided giving false information for fear of making his position worse.* Erroneous information implicating innocent people and leading the customs agents on a "wild goose chase" could only, in his mind, have gotten him into more serious trouble with both customs and the authorities handling the other narcotics case in which he was then involved. See *United States v. Paradise, supra,* where an arrest without warrant was based upon information from narcotics addicts. The Court stated: "As a matter of fact the arrest was not illegal in view of the information in possession of the agents which led to the arrest." See also: *Williams v. United States, supra,* where an arrest without warrant was based upon information from persons held in custody by the police.

Not only was Martinez's position precarious, as he well knew, but it might be pointed out that the fact both men had failed to register under Title 18, United States Code, Section 1407 would have indicated to some degree to the

agents that they were afraid to call attention to themselves. That being true, this fact was one more point, although a small one, which added to the corroboration of Martinez's story.

Not only did the officers realize that Gilbert Martinez had a very good motive to tell the truth during the interrogation, but *he told a full and comprehensive story of the transactions.* In other words, it was not an anonymous "tip" from an identified source where the officers had no opportunity to place responsibility for an untrue allegation. It was not a bit of brief information from a source where the officers failed to interrogate the informant for any great length of time. Martinez was telling them the story *in the role of an eyewitness to the events* which he was relating. He gave all of the details, the times and the dates when the various parties left their destinations or arrived at certain places. He related the various activities of all the persons involved during the time the events were occurring. The information which he gave to the agents could hardly have been related in more detail. And he normally would have been used as a witness in Court against appellant and her husband.

In *Reyes v. United States,* 258 F. 2d 774, 784 (9th Cir. 1958):

> "This Court has taken and will again take judicial notice (as did the court below) of the great public danger that there will be attempts to smuggle such drugs into the country every time an addict or user crosses the boundary line [footnote 9, p. 785.] 'Narcotic offenders are generally *recidivistic* in that the addict by definition is engaged in a course of *repetitious behavior* and those engaged in selling narcotics are predominantly either professionals or addicts.'" (Emphasis ours.)

The agents had seen the marks on the arms of Mr. Martinez that showed he was an addict and had had past experience with narcotics. Thus, they could correctly assume that he did have an awareness of the specific contraband involved. Martinez further admitted that he was on bail for a state narcotic charge, which was not unbelievable because of the marks on his arms. Further Rodgers had actually been convicted of a 1952 narcotic offense. If this Honorable Court has taken judicial notice of the fact that there will be attempts to smuggle such drugs into the country every time an addict or user crosses the boundary line and that most narcotic offenders are generally recidivistic in that the addict by definition engages in a course of repititious behavior, it is felt that the agents had the right to come to the same conclusion at that time. In fact, they were men who were working at the border with that very problem constantly at hand and were even more familiar with the situation than those of us who hear about it in the courts of law.

Appellant appears to contend that because many of the corroborating circumstances were not criminal acts *per se,* they cannot be used to legally justify the agent's belief in Martinez's story. However, it is submitted that circumstances and information used to corroborate an informant's narrative of events leading up to a crime need not be in themselves criminal acts. They only need be sufficient to establish the trustworthiness of his story. In the *Brinegar* case, *supra,* the court on page 175 commented as follows:

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. *These are not technical; they are factual and practical considerations of everyday life* on which reasonable and

prudent men, not legal technicians act. The standard of proof is accordingly correlative to what must be proved."

In the case at hand, not only were the agents aware of Rodgers' past narcotic conviction and Martinez's heroin addiction, as well as the latter being out on bail on a state narcotics charge, but many of the facts which Martinez gave them proved to be correct. This was true even though Martinez had had no opportunity to get together with Rodgers on his story. Thus, not only were Rodgers and Martinez persons who were in the "recidivistic" class but Martinez's narrative held together in many of its details. It proved to be trustworthy. Before the agents even talked to Martinez, Mr. Rodgers had admitted to them that he and Martinez had left San Francisco for Tijuana with their wives. Thus, the agents knew that Martinez had been along on the trip from San Francisco and had been in a position to know the information he related. Rodgers also divulged that a fifth person named Manuel had gone along on the trip and stated that he had "cut out" and did not know what happened to that person. Martinez likewise told the agents that a fifth person named Manuel had been along on the trip and related the story about Rodgers getting "taken" for $600.00 by Manuel, purportedly for a heroin purchase. Thus, Rodgers own admission that Manuel had "cut out" corroborates to some extent Martinez's story of the theft. Martinez also told the agents that Rodgers had received a check in the process of the transaction for $2,000.00. This check was found in Rodgers effects. Not only did the finding of the check substantiate Martinez's narrative, but it was not unrealistic for the officers to assume that a person in possession of a large sum of money, who had been previously convicted of a narcotics offense and was

returning from Mexico, might well be involved in a narcotics transaction. The heroin marks which were found on Martinez's arm and which added substantial corroboration to this story have been discussed above. Martinez also told the agents that he worked as an informant for the Federal Bureau of Narcotics in San Francisco and named several agents known to officer Spohr as persons with whom in the past he had worked. Although Spohr did not attempt to check that information further, the hour having grown late past usual business hours, and time being of the essence in his opinion, the fact that Martinez named actual persons is still a consideration which Spohr could use in determining whether or not Martinez was telling him the truth. In other words, that information added something to the weight of all the other factors which legally justified Agent Spohr in effecting appellant's arrest.

Although Mr, Rodgers had stated that the wives were in Los Angeles, appellant staying with her sister [Tr. 98-102], the agents found a suitcase containing women's clothing in the automobile. Certainly this was sufficient to throw grave doubt upon the assertion of Rodgers that his wife was in Los Angeles rather than at the bus station where Martinez claimed she would be. It would have been *unlikely* that the clothing would have been left with Mr. Rodgers and Martinez if the women had been in Los Angeles as Mr. Rodgers claimed. As a matter of fact, Martinez's statement about the women was proven to be true, *by locating them at the bus station* where he said they would be. Appellant's Opening Brief at page 6 attempts to show that "contrary to Martinez's information, appellant and Mrs. Martinez were not there." However, a reading of the transcript shows that that statement is misleading, since the women were in San Diego at a

coffee shop *adjacent to the bus station* [Tr. 112]. They were identified as Mrs. Rodgers and Mrs. Martinez before even appellant claims she was arrested. This item of corroboration was most important as far as the agents were concerned since *Rodgers had obviously attempted to conceal the whereabouts of his wife* whom Martinez had stated carried heroin across the border in her body cavity. This circumstance in itself establishes to a great extent the reliability of Martinez's information. See *People v. Holguin, supra,* wherein the court states:

> "The appearance of the appellant at the bar coincided exactly with the description given by the informer and that in and of itself was some evidence of the reliability of the information provided by the informer."

This case is distinguished from those in which there is a question of the identity of a suspect and innocent persons are subject to arrest because of a vague description fitted to a wrong person. Appellant's presence at the Greyhound Bus Depot fitted Mr. Martinez's story of the separate border crossing by the men and women. It is submitted that at the time the women were identified as Mrs. Rodgers and Mrs. Martinez, the officers had sufficient information to constitute legal probable cause to arrest appellant. In other words the agents were, up to that time, justified in believing Martinez's story that appellant had crossed the border with heroin in her body cavity. Thus, it would appear to be unnecessary to determine the question as to when the arrest took place. However, in the event the court wishes to consider that question, appellee will address itself to the issue briefly. It was not until the two women were on their way out the door or perhaps outside of the building that Agent Spohr stated: "You are under arrest." It is the appellee's position that the arrest did not occur until that time. It should be noted that

when the agents went up to the booth where Mrs. Rodgers and Mrs. Martinez were seated, they merely identified themselves as customs agents, showing their credentials. At about that time Agent Spohr asked both women "if they would accompany" him. Appellant's statement at page 6 of her brief that "Spohr informed them that they would have to accompany him" is somewhat misleading. Agent Spohr himself testified on two different occasions [Tr. 113-159] that he asked the women "if both the ladies would accompany" him and "if they would come with us." Agents Gates testified on the same subject [Tr. 186]. However, then it was counsel for appellant who in his question said, with reference to what Agent Spohr had told the women, "* * * did he then say, 'you'll have to go down to the police station,' " Agent Gates answered "As I recall." However, the court in its findings of fact stated [Clk. Tr. 48] that "Agent Spohr asked the women *if* they would accompany him." (Emphasis ours.) It is obvious that the women did not understand that they were under arrest since Mrs. Rodgers stated "Well, where are we going?" [Tr. 113]. It was only at that point that Agent Spohr told her she was going to the San Diego City Jail and she was under arrest. Of course, if the arrest occurred at the time Agent Spohr told Mrs Rodgers that she was under arrest, then the agent had the right to consider the additional corroboration of the fact that at least one of the women told the agents they had just arrived from Mexico a few hours before and they possessed a handbag of the type commonly sold in Tijuana. It might be noted that in connection with the statements of one or both of the women about having just arrived from Mexico and possessing a type of handbag which is commonly seen and sold in and about Tijuana, the transcript does not appear to show that the two agents did *not*

see the Mexican handbag at the time they came up to the cafe booth and identified themselves. In fact, a reasonable inference would be to the contrary, that is, that the agents were able to see the handbag when they came up to the booth. At any event, it is submitted that the arrest occurred at the time Agent Spohr stated that appellant was under arrest and not beforehand. The fact of an agent asking a person *if* that person would accompany him does not mean that such a person then would be considered under arrest. This is true even though the agents may have come into the area with the intention of placing someone under arrest. It is what happened at and near the time of arrest which determines the issue, not what the agents had previously decided to do. Thus, they would still be entitled to consider the Mexican handbag and the statements of one or more of the women with respect to having just returned from Mexico as a final piece of corroboration to the truth of Martinez's story. In fact, Agent Spohr no doubt delayed placing appellant under arrest for the purpose of receiving some information from her.

It is clear that the officers were justified in believing that time was of the essence. The agents had no opportunity to procure a warrant of arrest. They did not finish questioning Martinez until after 6:00 in the evening, a time when judicial officers normally are no longer at their offices. Considerable delay would have been caused in attempting to find a judge or commissioner and then arranging for the warrant. Martinez told the officers that appellant was at the Greyhound Bus Depot in the city of San Diego and that they had been told to stay there where their husbands would join them for the trip to San Francisco. It is obvious from the transcript of evidence that the women could well have been at the bus depot from

even before 3:00 in the afternoon up to the time the officers concluded talking to Martinez. The arrangements had been made for the men to meet their wives at the bus station at approximately 5:30 and the officers did not arrive in San Diego until 6:45. Under all the circumstances, it was reasonable for the officers to believe that the women could have become impatient and apprehensive about their husband's failure to show up and proceed north without them. On the court's finding of the distances involved in even attempting to locate the United States Commissioner, to which no objection was placed by trial counsel at the hearing, the officers could probably not have reached the bus station until two or more hours after the time they did arrive. During that time the women were transitory and very likely would not have been there. Starting to travel to San Diego at a time *after* the two men were supposed to meet their wives in the latter city, the agents had to act fast.

Mr. Justice Minton, in *United States v. Rabinowitz,* 339 U. S. 56, stated, at page 65:

> "A rule of thumb requiring that a search warrant always be procured whenever practical may be appealing from the vantage point of easy administration. We cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search. It is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant. Whether there was time may well be dependent upon considerations other than the ticking off of minutes of hours. The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure

a search warrant. Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint no laws are essential.

"It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches. It is not disputed that there may be reasonable searches, incident to an arrest, without a search warrant. Upon evidence of this established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required. To the extent that *Troupiano v. United States,* 334 U. S. 699, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. *The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."* (Emphasis added.)

The facts in *United States v. Walker,* 246 F. 2d 519 (7th Cir. 1957) are similar in some respects to those in the within case. In a narcotics prosecution the defendant made a motion to suppress under Rule 41 of Title 18. The trial court denied the motion on the ground that the agent involved had "reasonable ground" to believe that the defendant was committing a crime. The Court of Appeals affirmed the judgment. The defendant testified in support of his motion and it developed that he had never been previously arrested. On the day of the arrest he left his

home in the afternoon in his automobile accompanied by two adults and a child. While the defendant was proceeding along a public street, his automobile was curbed by another vehicle in which the federal agents were riding. The defendant and all occupants of his automobile were ordered out and told to place their hands on the top of the vehicle and submit to search. The defendant testified that at the time of the arrest, search and seizure he was not violating any laws, but was just driving down the street.

The only evidence in the agents testimony which was allowed in the record with respect to the source of his facts was that he had received information concerning the defendant and thereafter made a check of the files in his office for the name of the defendant, which check was negative. In the company of another agent he proceeded in his automobile to a certain place and observed a Pontiac that had been described to him over the telephone by the informant. The agent maintained surveillance on the Pontiac and eventually saw the defendant in the company of another man whom he had arrested three weeks prior to that time. The agent subsequently came up to the car and told the defendant he was under arrest. Thereafter, in searching him at that place the agent found a cigarette package on the defendant's person containing a glassine envelope with a white powder inside. During these times the agent had no knowledge of his own about the defendant, and only had the information which the informant had given him over the telephone. In an extensive review of the problems involved in determining probable cause, the court stated that "fresh combinations of facts must necessarily be examined under the terms labeled 'probable cause' and 'reasonable grounds' for neither one is a static concept." The court in that case held, in effect, that the officer was not acting only on an "inkling."

It is interesting to note that the *Walker* case, *supra,* is cited in appellant's opening brief at page 16, apparently with approval. Also it should be noted that the court said "that defendant was traveling by automobile further explains the need for action without a warrant."

With respect to *Contee v. United States,* 215 F. 2d 324, 326, cited in appellant's opening brief, the court in the *Walker* case, *supra,* stated "that Contee * * * is inapposite is patent from the flimsy testimony given by the arresting officers, in that appeal."

In the *Contee* case, the court stated:

> "As we have seen, the officer here testified that an individual who 'lived in the neighborhood, apparently, and knew Contee' was his sole source of information. An *uncorroborated tip* by an informer whose identity and reliability are both unknown does not constitute probable cause to make an arrest. Nor is any exceptional circumstance alleged to have existed here; there is *no suggestion that appellant would have escaped,* or there was any necessity for apprehending him in the small hours of the morning." (Emphasis ours.)

The evidence there had shown that the officers only source of information was a man who told him that *Contee* "was the party that had been involved in some robberies." The agent stated that he didn't even know the informant's name. Further, the agent was unaware of whether the man actually lived in the defendant's neighborhood and really knew the defendant. *The informer was not one of the witnesses.*

It is evident that the facts of the case in *Contee v. United States, supra,* do not parallel in any respect the circumstances in the case under consideration here. The

arrest was made at the defendant's house at a time when there was no emergency shown to exist and it was made on uncorroborated and brief information supplied by an informant who was unknown even to the agent. Also, there was no showing in the case that the agent had had any chance at all to observe the demeanor of the anonymous informant.

In the case of *United States v. Castle,* 138 Fed. Supp. 436, cited in appellant's brief, the court complained that there was no emergency shown. It was stated that the agents could have put surveillance on the house of the defendant since they had heard of his alleged illegal activities before the particular time involved in the case. The defendant was still there at his home and there was no showing that he was planning to escape from the premises. Thus, that case is also distinguishable from the instant matter.

In view of all of the above reasons showing that officer Spohr and Officer Gates had probable cause in effecting the arrest of appellant, it is not considered necessary to extensively explore the question of whether or not the two parcels of heroin were given to the agent with consent of appellant. Again, appellant's opening brief is somewhat misleading in a statement relating to the transfer of the Kleenex tissue and heroin to the agent. At page 6, appellant states, "He immediately demanded that she give it to him, which she did" [Tr. 117]. However, agent Spohr testified that "I asked her what she had in her hand and *I would like to see it*" [Tr. 116]. (Emphasis ours.) Perhaps appellant was referring to the finding of fact by Judge Carter as follows: "He said, 'what have you got in your hand?' Mrs. Rodgers showed him the Kleenex and he said, 'give it to me'" [Clk. Tr. 49]. However, the agents testimony was actually as indicated above. After

Mrs. Rodgers had handed over the Kleenex containing the rubber contraceptive and white powder similar to heroin, agent Spohr then stated "where's the rest of it." Mrs. Rodgers then reached into her dress and produced another Kleenex which also held a rubber contraceptive containing a white powder like heroin. There was no threat or force used in recovering the heroin from Mrs. Rodgers nor was she touched in any way by the agents or anyone else in that respect. Thus, it might be said that the appellant consented to giving the heroin to Agent Spohr. However, it is felt that the question of whether or not the judgment of conviction should be affirmed should be based upon the fact that the officers did have probable cause in their actions.

In conclusion on this point, the Supreme Court in *United States v. Rabinowitz,* 339 U. S. 56, stated with respect to the test of reasonableness under all circumstances (p. 65): "Some flexibility will be accorded most officers engaged in daily battle with criminals for whose restraint criminal laws are essential." And also (p. 66), "The relevant test is not whether it is reasonable to secure a search warrant but whether the search was reasonable. That criterion in return depends upon the facts and circumstances—the total atmosphere of the case." Congress enacted Title 26, United States Code, Section 7607 in part to afford such flexibility to narcotic enforcement officers in view of the easy concealment, transportation and destruction of narcotics because of their small volume and high price. This problem is particularly acute at the border between Mexico and California. See House Public Committee Report on Narcotics, 2 United States Code Congressional and Administrative News, page 3302 (1956).

III.

No Error Was Committed by the District Court in Connection With Agent Spohr's Notes.

Initially, it should be noted that the requests to see agent Spohr's notes were made during his testimony on certain *pre-trial* procedure.

On December 18, 1957, appellant and her deceased husband, Evan W. Rodgers, who was then a defendant in the same action, filed a notice of motion and motion to suppress the heroin which had been given to agent Spohr by appellant on October 11, 1957 [Clk. Tr. 3-12].

The above motion was filed pursuant to the provisions of Rule 41(e) of the Federal Rules of Criminal Procedure which provides that "the motion shall be made *before* trial or hearing * * *" (Emphasis ours), with certain exceptions noted therein.

There is no showing in the record that, at the time the motion was filed and during the hearing itself, appellant had an understanding with the government that the evidence adduced during the hearing on the motion would be deemed to be the trial of the case. As a matter of fact, after the hearing of the motion to suppress and the entry of not guilty pleas by each defendant [Tr. 217], the government asked to have an early setting for trial [Tr. 218] and stated that the case would probably only take two days to try [Tr. 219]. The court then set the case for trial on January 14, at 10:00 A.M. [Tr. 220, Clk. Tr. 24.]

Thereafter, the government and appellant on February 14, 1958 prepared a stipulation that the evidence introduced on hearing of the motion to suppress could be heard and considered by the court as evidence on trial of

the merits of the case, "having the same weight and sufficiency *as though introduced anew.*" (Emphasis ours.)

The stipulation further provided that

> "*the defendant herein waives all objections to the introduction of said evidence* except that defendant objects to the introduction of said evidence on grounds heretofore set forth by defendants in connection with their motion to suppress evidence."

It is apparent that by the provisions of the stipulation the appellant waived *all* objections to the introduction of the evidence, except that she was still contending that the heroin should be suppressed because of the alleged lack of probable cause. The fact that trial counsel for appellant was only depending on the possibility of the court reconsidering its denial of the motion to suppress on the above ground is particularly apparent when it is considered that he, and appellant, in effect, stipulated to the latter's guilt under the section, if the evidence were not suppressed, because it was provided therein that the powder contained in the two rubber contraceptives was brought into the United States from Mexico by appellant and that upon analysis the powder was found to be and was heroin.

Thus, it is clear that under the stipulation appellant intended to and did abandon any objection to the intro- that she was still hoping the court would reconsider its decision on the motion. If appellant had desired to preserve any of the specific rulings on her objections to evidence or motions which had been made during the time of the pre-trial hearing for reconsideration of the trial court on the issue of her guilt, she could have easily done so within the terms of the stipulation itself. After the hearing of the motion to suppress, and up to the time

the stipulation was actually prepared by the parties on February 14, 1958, and even up to the time it was approved and filed by the District Judge on March 10, 1958, there was ample opportunity for counsel for appellant to consider the incorporation of a provision for the preservation of his right to request the notes which were mentioned during the agents testimony, and, if such were granted, for further cross-examination of the agent.

It should be also noted at this point that, as will be discussed hereafter, counsel for appellant did not lay a sufficient foundation for the production of any such notes, except one, for his use at the time of the pre-trial hearing nor did he call the court's attention to any applicable law which would govern their production. This could have been done upon a renewal of his request for the notes pursuant to a provision of the stipulation preserving his right to do so.

The record shows that the motion to suppress was heard beginning December 23, 1957 at San Diego, California. As of that time, not only the case of *Jencks v. United States,* 353 U. S. 657, had been decided, but Section 3500 of Title 18, United States Code, providing for the production of certain statements, had been in effect since September 2, 1957.

In the case of *United States v. Palermo,* 258 F. 2d 397 (2nd Cir. 1958), the court held that

> "This section was enacted after the decision of the United States Supreme Court in *Jencks v. United States,* 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2nd 1103. Its purpose was to fix standards by which statements and reports of a witness in the possession of the government should be made available to a defendant in a criminal prosecution after the witness had testified. * * * Without considering whether

there is a conflict between the *Jencks* decision and the requirements of section 3500, we hold that the legislation is the *exclusive* standard in this field and controls the procedure to be followed in such cases. Otherwise, the legislation is meaningless." (Emphasis ours.)

Section 3500 provides in part:

"(a) in any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective government witness * * * to an agent of the government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the *trial* of the case." (Emphasis ours.)

It should be noted also that the statute in sub-paragraph (c) provides for an

"in camera inspection of an alleged statement by the court in order that such portions of the statement could be excised which do not relate to the subject matter of the testimony of the witness."

The statute in that sub-paragraph also refers to the "trial."

It is obvious that the provisions of the so-called "Jencks Law" that is, Section 3500, are *only* applicable to testimony given during the *trial* itself, not to pre-trial procedure. Any other conclusion would fly in the face of the statute itself.

While it is true that the evidence adduced at the time of the motion to suppress, together with certain other agreements of fact contained in the stipulation filed in March, later were considered by the court on the merits of

the questions of appellant's guilt, at the time the motion to suppress was heard it was not considered to be more than a pre-trial hearing on the issue of probable cause. That is, the testimony taken during that motion was primarily geared to matters of *hearsay* from which the court was called upon to determine whether or not the officer had reasonable grounds to arrest the appellant. Thus, it became necessary for the appellant, in order to preserve any alleged right to view agent Spohr's notes, to do so within the terms of the stipulation which was filed at the later date.

In the case of *United States v. Palermo,* 21 Fed. 11 (U. S. D. C., N. Y. 1957) the District Court stated at page 13:

> "It has been regarded as well settled that a defendant in a criminal case is not entitled to pre-trial inspection of the statements of prospective prosecution witnesses (citing cases)."

The above court went on to discuss the defendant's argument in the *Palermo* case that the *Jencks* case placed a different aspect on the

> "hitherto well-settled rule denying defendants in criminal cases the right to inspect statements of prospective prosecution witnesses. He asserts that at least two of the witnesses from whom the government has taken statements—his own two accountants—who prepared the questioned income tax returns—will necessarily be called by the government at the trial in order to make out a case. Arguing from this premise, defendant contends that, since, under the Jencks case, he will be entitled to inspect the statements of such witnesses in the hands of the government when they are put on the stand he should

necessarily be allowed to have such inspection before trial under Rule 17(c), F. R. Crim. P.

"The defendant's premise that these witnesses will necessarily be called by the government cannot be substantiated. * * * the Government * * * was not committed to calling either the two accountants or the two Special Agents."

If a conventional trial had been had, with the calling of witnesses, Agent Spohr could not have testified as to the hearsay information he had secured from talking to Martinez, except as to the issue of probable cause, had that issue been reserved for the trial. Agent Spohr could only have testified as to what he saw or did and of his specific contact with and the arrest of the appellant, following which the heroin was secured. The notes of Agent Spohr probably concerned themselves with probable cause derived from information related to him by Martinez. There was no showing of a "statement," as such, so far as the witness agent Spohr was concerned.

At any event, the government's position is that, even so, the appellant is not entitled to the notes by reason of Section 3500 before actual trial is commenced. This is logical since it is normally only at the trial that the facts relating to the *issue of guilt* would be pertinent. It is felt that Section 3500, not only by its terms, but in reason applies to the time when witnesses are presented against the defendant on the direct question of whether or not a violation of law by that defendant has occurred.

In *United States v. Rosenberg,* 157 Fed. Supp. 654 (U. S. D. C. Pa. 1958) the court stated at page 661 "the decided cases make it clear that a defendant has no right *prior to the trial* to statements of witnesses * * * (citing cases)" (emphasis ours).

That court also quoted with approval from *United States v. Rosenberg* (3rd Cir. 1957), 245 F. 2d 870, at 871 as follows:

> " 'The failure of the trial judge to permit counsel for the defendant to inspect *at the trial* the witness' grand jury testimony and statement to the FBI, as required by the rule announced in the Jencks case, compels us to grant a new trial.' " (Emphasis applied.)

Thus, the District Court in the *Rosenberg* case at 157 Fed. Supp. 654 rejected the defendant's contention that the court had the duty of submitting certain statements to the defendant prior to trial.

In the case of *United States v. Walker,* 246 F. 2d 519, *supra,* the court stated at page 525:

> "The key issue at that suppression hearing was whether Spaline had reasonable grounds to believe that Walker had committed or was committing a violation of any law of the United States relating to narcotic drugs. Communication emanating from the informer was relevant to show that Spaline obtained knowledge about Walker forming the foundation on which the agent built his cause for acting. The informer's testimony was *not* offered at the *pre-trial hearing* for the purpose of proving Walker guilty of the offenses for which he was about to be tried—*the issue at that preliminary stage is related to Spaline's state of mind.* * * *" (Emphasis ours.)

The above *Walker* case emphasizes the fact that a suppression hearing is a "preliminary stage" and that the only issue thereon is related to the agent's state of mind, not the defendant's guilt of the offenses for which he is about to be tried. Because of the nature of the suppression

hearing and the issue involved, it is submitted, as indicated above, that the terms of Section 3500 should not be improperly extended to anything but the "trial" of the case where the issue of the defendant's guilt for the offenses is then at hand. *Otherwise, pre-trial could be used for improper discovery.*

Further, it should be stated that it can hardly be claimed that the defendant suffered any prejudice by reason of the court's denial of access to Agent Spohr's notes. There was no specific showing that there was anything in the notes which related to more than two small points of the agent's testimony on the issue of probable cause. As a matter of fact, the defendant was allowed to see the agent's notes on one of those matters, that is, Martinez's place of employment. The other involved a question of the amount of cash which the appellant's deceased husband, not appellant, had on his person at the time he was placed in custody at the border. The court then denied that latter request on the grounds that it was not a material point to the hearing.

Further, it appears that only one yellow sheet was marked as Exhibit No. 1 and ordered sealed by the court. Appellant up to this time has apparently not endeavored to secure an order of the District Court so that the sheet involved could be examined by this appellate court to determine whether any of the testimony other than as indicated in the record was material to the testimony. Although it is not clear, it seems from the record that there were other notes which were not sealed as Exhibit No. 1. Thus it does not appear that this court has before it an adequate record to consider any question of materiality or prejudice which may have resulted to appellant by reason of the court's ruling.

The first time the notes in question were mentioned was on cross-examination of agent Spohr by trial counsel for appellant. At that time [Tr. 140] agent Spohr had only one paper before him on which he apparently had written down the name of the nursery where Martinez stated he worked [Tr. 138, 140]. The rest of the notes were in the possession of government counsel. At counsel's invitation, witness Spohr used that note to refresh his recollection and gave the exact name of the nursery where Martinez told him he worked. Later, counsel for appellant asked the court if he could look at the paper that witness Spohr had used to refresh his recollection, that is, the one on which the address and occupation of Martinez was noted. The court then showed counsel that part of the note which contained the name and address of Martinez's place of employment. That was apparently the only note which was marked for identification as Exhibit 1 [Tr. 165-166].

Previously, counsel for appellant asked witness Spohr some questions which respect to some small cash which Mr. Rodgers had had in his possession, in addition to the $2,000.00 check, at the time he was taken into custody on October 11, 1957. Counsel asked Spohr if the former would like to check his notes to determine how much cash Rodgers had had. The witness answered

> " 'I don't recall how much it was (stepping down from the witness stand).' Then counsel for appellant stated 'It must be a valuable file. Will you take your notes back to the witness stand, please, Mr. Spohr?'
>
> "Your Honor, *I think* the witness refreshed his recollection from something at the table. I would like to look at it if I may."

Witness Spohr stated that all he did was to put the amount of money at the top of the heading. The court then denied counsel's request to look at the note [Tr. 164, 165]. There was no foundation laid to show that witness Spohr actually did refresh his recollection from it. Counsel for appellant only stated that he *thought* that the witness had refreshed his recollection. Thus, from the record it is impossible for this court to determine whether or not the witness had actually refreshed his recollection on that point.

The above appeared to be the only two instances where any mention is made that the witness Spohr refreshed his memory from notes. In connection with Martinez's occupation, counsel for appellant was shown the note to that effect. On the other, with respect to the cash, an insufficient foundation was laid to show that the witness actually refreshed his recollection from any notes.

Thereafter counsel for appellant, after looking at the notes containing Martinez's place of employment, asked the court "Are you just going to show me that portion of it?" The court then replied, "Yes, that is what you wanted to see, the notes that showed the address and Martinez's place of employment." Then counsel for appellant stated that he "would like to see them all * * *." Technically, it could be said that the court did not actually deny defendant's request, as all he stated was "I wouldn't be surprised you would." Counsel did not pursue his request further or ask the court if his request had been denied, only saying, "Could it be marked, Your Honor?" The court then allowed the one note that showed Martinez's place of employment marked Exhibit No. 1 for identification as requested and thereafter sealed it.

It may be of interest to this court to note that witness Spohr stated that whether or not Martinez had told him of any prior arrest was not set forth in his notes [Tr. 141]. Also agent Spohr did not put in his notes the information that Martinez gave him as to how long Martinez had been using narcotics [Tr. 144-145]. The "first" conversation, which counsel for appellant asked Agent Spohr about was not in the notes (apparently Agent Spohr was referring to a "fishing expedition" which he had with Martinez prior to the time Martinez told him of the trips to Tijuana for heroin) [Tr. 145].

From the above, it is apparent that the only foundation laid as to the contents of the notes was in respect to the small amount of cash which Rodgers had on his person at the time he was taken into custody, a fact held not material to the hearing by the court, and Martinez's place of employment. The only specific testimony was to matters *not* contained in the notes.

Under the case of *United States v. Miller,* 248 F. 2d 163 (2nd Cir. 1957), the court stated at page 166:

> "Under the Jencks case the defense must lay a preliminary foundation that a statement or report is in existence and relates to the subject matter of the testimony of the witness. We do not think such preliminary foundation was laid with respect to a prior report by Shershen."

In the within case, it appears that it would be impossible to determine the relation of the notes to witness Spohr's testimony, because of the lack of proper foundation and the status of the record on appeal.

In conclusion on this second and final point, it is submitted that, however, the matter involving the notes should be disposed of upon the ground that appellant

during the pre-trial hearing had no right to see the agent's notes under the terms of Section 3500 of Title 18, United States Code, and, at any event, because of the stipulation which was later filed with respect to the actual trial of the case, abandoned any such request for production.

Conclusion.

In view of the above, the government strongly urges that the judgment of conviction the trial court, sitting without a jury, should be affirmed.

On the question of probable cause, as stated by the court in *Lawson v. United States,* 254 F. 2d 706 (8th Cir. 1958), the *attending circumstances tended to corroborate* the statement by informant Martinez to Agent Spohr. The facts and circumstances known by the agent and the inferences that might reasonably be drawn therefrom were such as not only "to warrant but to *impel* a reasonably discreet and prudent man * * *" to believe that an offense had been committed by appellant. (Emphasis ours.) Thus, the defendant's rights were not violated under the Fourth Amendment because the "seizure" of the heroin was not unreasonable.

With respect to the notes, (1) the appellant was not entitled to access to any more of the notes than were shown to counsel at the time of the hearing on the motion to suppress. Although some of the evidence taken at the hearing, together with other stipulations as to facts, actually became the evidence upon which the government relied on the issue of guilt at a later time, it was not contemplated that such would be the case at the time the hearing proceeded, when he had no right to access. (2) Thereafter counsel failed to preserve his request and

actually abandoned the point for the purposes of trial. (3) On the only point on which Agent Spohr was actually shown to have refreshed his memory from a note, that portion of the notes was shown to counsel for appellant. Thus, no error was committed by the trial court in respect to this contention.

Respectively submitted,

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